

DOCUMENT #5377
ADOPTED

MEMORANDUM

JANUARY 16, 1991

TO: Boston Redevelopment Authority and
Stephen Coyle, Director

FROM: Linda Bourque, Assistant Director for
Neighborhood Planning and Zoning
Ellen Pinkos, Land Use Attorney
Alison Mayes, Special Assistant

SUBJECT: Request Authorization to Petition the Zoning Commission
to Adopt a Zoning Text Amendment to make Group Residences
for Persons with Disabilities an Allowed Use in Districts
Which Allow Residential Uses.

The Fair Housing Amendment Act of 1988 Amending Title VIII of the Civil Rights Act of 1968 (42 U.S.C. Section 1301 et seq. as amended) prohibits discrimination in housing practices against persons with disabilities. In that regard, the Commonwealth of Massachusetts Department of Mental Health has requested that zoning regulations in the state be amended, as appropriate, to ensure that there is no such discrimination in a municipality's land use laws regarding housing practices relevant to disabled persons. Staff therefore to BRA Board at your meeting on December 20, 1990, that the BRA petition the Zoning Commission on behalf of the Department of Mental Health to make certain zoning amendments.

At the hearing of December 20, 1990, the Board took this matter under advisement, and requested further information from the Commonwealth Department of Mental Health. Attached to this memo as provided by the Department of Mental Health are: (a) a list of number of residential programs and bed capacity by town; (b) community residences licensing regulations of the Department of Mental Health, 104CMR 18:02; and (c) percentage distribution of long-term mentally ill persons throughout the nine DMH planning areas of the state. Also, attached are two letters sent to over 700 community groups and leaders from the Massachusetts Department of Mental Health and the Mayor's Office of Neighborhood Services, respectively the letters informed community members about the legislative changes and contemplated zoning changes and invited them to an informational/discussion meeting on November 27, 1990. They also notified the community of the BRA Board hearing on December 20, 1990.

DMH data show the distribution of the 394 existing residential programs among 121 cities and towns in Massachusetts ranges from 1 residence in several towns, to 11 each in Boston, Lynn and Pittsfield; 12 in Cambridge; 15 and 16 in Fall River and Worcester, respectively; and 20 and 23 in Holyoke and Springfield, respectively.

DMH data also show that there are approximately 44,207 persons in the Commonwealth that make up their priority population. DMH

breaks this figure down into a distribution over their nine regions. The percentage of the population by region ranges from 8.10 percent in the Merrimack Region to 13.80 percent in the West Region to 20.20 percent in the Metro Boston Region. The distribution of their population is relatively consistent with the distribution of all Commonwealth residents throughout their regions.

At the BRA hearing of December 20, 1990, the Board also asked staff what the Attorney General's office position is on the applicability to the Boston Zoning Code of the state and federal laws regarding group care residences. In a memorandum from Ruth Bourquin of the Massachusetts Department of the Attorney Generals dated January 4, 1991, Ms. Bourquin states the following:

The Massachusetts Legislature amended G.L. c. 40A, § 3 in 1989 specifically to provide that cities and towns, including Boston, are prohibited from discriminating against the disabled through imposition of land use requirements. The Legislature provided, moreover, that the imposition of land use requirements on congregate living arrangements for the disabled that are not imposed on families is discriminatory. See St. 1989, c. 106, § 1 and c. 341, § 117. In sum, the amendments to G.L. c. 40A, § 3 require that group homes for the disabled be treated just like any homes in which families reside. The Boston special permit process clearly violates this mandate. Regardless of how many group homes have been sited in Boston pursuant to that process, imposition of the special permit process on group homes but not families violates the law.

The United States Congress similarly amended the federal Fair Housing Act in 1988 to provide additional protections for residences for the disabled. In 42 U.S.C. § 3604 Congress has provided that it is unlawful "To discriminate in the sale of rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of -- . . . (B) a person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or (C) any person associated with that buyer or renter." 42 U.S. § 3604 (f) (1). In addition, the 1988 amendments provide: "For purposes of this subsection, discrimination includes -- . . . (B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling . . ." Id., (f) (3) . . .

Currently, the Boston Zoning Code, as a practical matter, does not allow the siting and operation of group residences by right and defines two categories of group residences. A "group care residence, limited" is allowed in residential and business

districts, but only if among the City, the state and the BRA there exists a cooperation agreement relating to the location and operation of the residence. Section 2-1(22B) defines "group care residence, limited" as premises licensed, regulated or operated by the Commonwealth of Massachusetts or operated by a vendor under contract with the Commonwealth for the residential care or supervision in any single dwelling unit of no fewer than five nor more than twelve mentally ill, mentally retarded, or physically handicapped persons, plus staff.

The second category is "group care residence, general," is not the subject of this proposed zoning amendment and would remain conditional in the Code. This use item is conditional in all residential and business districts and forbidden in all industrial districts. Section 2-1(22-A) defines "group care residence, general" as premises for the residential care of supervision (but not including custodial care) of ex-alcoholics, ex-drug addicts, pre-release or post-release convicts or juveniles under seventeen years of age who are under the care of correctional agencies of the Commonwealth, but not including the residential care of mentally ill, mentally retarded, or physically handicapped persons if such care is licensed, regulated or operated by a vendor under contract with the Commonwealth.

In order to comply with the Act of 1988, staff recommends changes to the first category above, "group care residence, limited", and to the definition of family. The Code makes it difficult to site residences for persons with disabilities in that this use item only allows such residences if they are not within 1,000 feet of another residence, and if there is a cooperation agreement among the City, state and BRA. Also, the term "family" in the Code is defined as

"one or more persons occupying a dwelling unit and living as a single, non-profit housekeeping unit, provided that a group of five or more persons who are not within the second degree of kinship shall not be deemed to constitute a family."

This definition would preclude a group residence of five or more persons which is the more typical size of such residence.

Staff recommends that "group residence, limited" be allowed in any district which allows residential uses. Staff also recommends that the definition of "group care residence, limited" be amended to remove the numerical limitation which exists and that the reference "group care residence" be changed to "group residence" given that medical care often is not provided at such residence. We recommend also that the definition of "family" be amended to include "group residence, limited". It also will be required to amend the Downtown and Harborpark districts in addition to the Core Code to implement these changes.

An appropriate vote follows:

THE ZONING COMMISSION OF THE CITY OF BOSTON:

The Boston Redevelopment Authority hereby petitions to amend the text of the Boston Zoning Code, as established under Chapter 665 of the Acts of 1956 as amended, as follows:

1. By adding in Section 2-1(16), after the word "family" and before the word "with," the following:
"or one limited group residence"
2. By deleting, in Section 8-7, Table A, Use Item Number 7B, and inserting in place thereof in Section 8-7, Table A, after Use Item Number 7A, the following use item:

	S	R	H	L	B	M	I	W	MER
7B. Group residence limited	A	A	A	A	A	C	F	F	F
3. By deleting Section 2-1(19) in its entirety and insert in place thereof the following definition:

(19) "Family", one or more persons occupying a dwelling unit and living as a single, non-profit housekeeping unit, provided that a group of five or more persons who are not within the second degree of kinship shall not be deemed to constitute a family, except that a "group residence, limited" shall be deemed a family.
4. By deleting Section 2-1 (22B) in its entirety and by inserting in place there of the following:

±(22B) "Group residence, limited", premises licensed, regulated or operated by the Commonwealth of Massachusetts or operated by a vendor under contract with the Commonwealth for the residential living, care or supervision in any single dwelling unit of five or more mentally ill or mentally retarded persons or persons with disabilities.

MEMORANDUM

TO: BRA Board

FROM: Linda Bourque

DATE: January 9, 1991

SUBJECT: Group Residences

Attached for your review is information requested at the hearing of December 20, 1990, regarding Group Residences. The package includes the following:

- ▶ list of the number of residential programs in each city/town in Massachusetts;
- ▶ percentage distribution of Department of Mental Health (DMH) priority populations over the nine DMH regions;
- ▶ memo dated January 4, 1991, from Attorney General's office regarding federal and state legislation affecting Boston;
- ▶ G.L. c 40A, § 3;
- ▶ letter from DMH to community (November 16, 1990);
- ▶ letter from Mayor's Office of Neighborhood Services to the community;
- ▶ Licensing regulations of DMH.

DMH data show the distribution of the 394 existing residential programs among the 121 cities and towns in Massachusetts ranges from 1 residence in several towns, to 11 each in Boston, Lynn and Pittsfield; 12 in Cambridge; 15 and 16 in Fall River and Worcester, respectively; and 20 and 23 in Holyoke and Springfield, respectively.

DMH data also show that there are approximately 44,207 persons in the Commonwealth that make up their priority population. DMH breaks this figure down into a distribution over their nine regions. The percentage of the population by region ranges from 8.10 percent in the Merrimack Region to 13.80 percent in the West Region to 20.20 percent in the Metro Boston Region. The distribution of their population is relatively consistent with the distribution of all Commonwealth residents throughout their regions.

At the BRA hearing of December 20, 1990, the Board also asked staff what the Attorney General's office position is on the applicability to the Boston Zoning Code of the state and federal laws regarding group care residences. In a memorandum from Ruth

Bourquin of the Massachusetts Department of the Attorney Generals dated January 4, 1991, Ms. Bourquin states the following:

The Massachusetts Legislature amended G.L. c. 40A, § 3 in 1989 specifically to provide that cities and towns, including Boston, are prohibited from discriminating against the disabled through imposition of land use requirements. The Legislature provided, moreover, that the imposition of land use requirements on congregate living arrangements for the disabled that are not imposed on families is discriminatory. See St. 1989, c. 106, § 1 and c. 341, § 117. In sum, the amendments to G.L. c. 40A, § 3 require that group homes for the disabled be treated just like any homes in which families reside. The Boston special permit process clearly violates this mandate. Regardless of how many group homes have been sited in Boston pursuant to that process, imposition of the special permit process on group homes but not families violates the law.

The United States Congress similarly amended the federal Fair Housing Act in 1988 to provide additional protections for residences for the disabled. In 42 U.S.C. § 3604 Congress has provided that it is unlawful "To discriminate in the sale of rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of -- . . . (B) a person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or (C) any person associated with that buyer or renter." 42 U.S. § 3604 (f) (1). In addition, the 1988 amendments provide: "For purposes of this subsection, discrimination includes --. . . (B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling . . ." Id., (f) (3). . .

It also should be noted that in regard to the existing conditions in the Zoning Code that make a group care residence allowed only if there is a cooperation agreement among the BRA, the City, and the Commonwealth, such cooperation was cancelled by the City in 1982.

Number of Residential Programs and Bed Capacity by Town

1/4/91

Town Name:	Number of Programs:
Acton	2
Amesbury	1
Amherst	4
Andover	1
Arlington	1
Ashland	1
Athol	1
Attleboro	6
Auburndale	1
Barnstable	2
Beverly	9
Blackstone	1
Boston	11
Braintree	3
Brighton	1
Brockton	3
Brookline	1
Burlington	1
Cambridge	12
Carver	1
Charlestown	1
Chelsea	3
Chicopee	9
Clinton	1
Concord	1
Danvers	3
Dartmouth	1
Dedham	2
Deerfield	1
Dorchester	8
Dudley	1
E. Braintree	1
E. Bridgewater	1
East Boston	1
Eastham	1
Everett	1
Fall River	15
Falmouth	1
Fitchburg	6
Foxboro	2
Framingham	9
Gardner	4
Gloucester	1
Greenfield	3
Hadley	1
Hamilton	1
Hanson	1
Haverhill	5
Hingham	1
Holyoke	20
Hyannis	1
Hyde Park	4
Ipswich	1
	2

Jamaica Plain	4
Lawrence	6
Leominster	2
Lewington	2
Littleton	1
Mell	4
Mudlow	1
Lynn	11
Malden	1
Marlboro	3
Medfield	1
Medford	2
Medway	1
Milford	3
Millbury	1
N Adams	1
N Attleboro	1
Nantucket	1
Needham	1
New Bedford	9
Newton	3
Northampton	3
Norwood	1
Orange	1
Orleans	1
Port of State	2
Worcester	1
Peabody	2
Pelham	1
Plymouthfield	11
Plymouth	8
Pocasset	1
Quincy	4
Randolph	1
Revere	2
Roslindale	1
Roxbury	3
S Hadley	4
Salem	2
Salisbury	1
Scattered	11
Scituate	1
Shrewsbury	1
Shutesbury	1
Somerville	5
South Boston	2
Southbridge	3
Southwick	1
Springfield	23
Stoneham	2
Sunderland	1
Taunton	9
Tisbury	1
W Springfield	1
Westfield	3
Worcester	2



The Commonwealth of Massachusetts
Department of Mental Health

Metro Boston Region

591 Norton Street

Dorchester, Massachusetts 02124

Henry Tomes, Ph.D.
Commissioner

Gerald J. Morrissey, Jr.
Director

Area Code (617)
265-3919
265-3924
727-4923

Percentage Distribution of
Priority Populations by Area
11/5/90

1. West	13.80	6,101
2. Central	11.10	4,906
3. Merrimack	8.10	3,581
4. North Shore	10.00	4,421
5. Metro West	8.99	3,974
6. Metro South	9.20	4,067
7. Southwest	9.10	4,022
8. South Shore	9.50	4,200
9. Metro Boston	20.20	8,930
	100.00% *	44,207

*rounding error



THE COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF THE ATTORNEY GENERAL

JOHN W. McCORMACK STATE OFFICE BUILDING
ONE ASHBURTON PLACE, BOSTON 02108-1698

JAMES M. SHANNON
ATTORNEY GENERAL

M E M O R A N D U M

TO: Linda Bourque, Boston Redevelopment Authority
FROM: Ruth Bourquin, Department of the Attorney General
RE: Boston Zoning Code and Group Homes
DATE: January 4, 1991

At your request, this memorandum will summarize the law that applies to the question of whether the Boston Zoning Code, as presently written, unlawfully discriminates against the disabled.

The Massachusetts Legislature amended G.L. c. 40A, § 3 in 1989 specifically to provide that cities and towns, including Boston, are prohibited from discriminating against the disabled through imposition of land use requirements. The Legislature provided, moreover, that the imposition of land use requirements on congregate living arrangements for the disabled that are not imposed on families is discriminatory. See St. 1989, c. 106, § 1 and c. 341, § 117. In sum, the amendments to G.L. c. 40A, § 3 require that group homes for the disabled be treated just like any homes in which families reside. The Boston special permit process clearly violates this mandate. Regardless of how many group homes have been sited in Boston pursuant to that process, imposition of the special permit process on group homes but not families violates the law.

The United States Congress similarly amended the federal Fair Housing Act in 1988 to provide additional protections for residences for the disabled. In 42 U.S.C. § 3604 Congress has provided that it is unlawful "To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of -- . . . (B) a

person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or (C) any person associated with that buyer or renter." 42 U.S. § 3604(f)(1). In addition, the 1988 amendments provide: "For purposes of this subsection, discrimination includes -- . . . (B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling . . ." Id., (f)(3). Failure of Boston to exempt group homes for the disabled from the onerous special permit process, which at best delays and at worst prevents occupancy of dwellings in the city, is a failure to make the necessary reasonable accommodations.

Equal protection arguments under both the federal and state constitutions can of course be made as well. Given the strength of the statutory requirements set forth above, however, it would not seem necessary to spell out those arguments at this time. I hope this information is helpful and that a prompt and amicable resolution of this problem can be achieved.

RAB/SAB
3182B/

§ 2, repealed, 1987, 685, § 2, approved January 6, 1988, effective days thereafter.]

§ 3. Limitations on Subject Matter.

No zoning ordinance or by-law shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code, nor shall any such ordinance or by-law prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture, horticulture, floriculture, or viticulture; nor prohibit, or unreasonably regulate, or require a special permit for the use, expansion, or reconstruction of existing structures thereon for the primary purpose of agriculture, horticulture, floriculture, or viticulture, including those facilities for the sale of produce, and wine and dairy products, provided that during the months of June, July, August, and September of every year, the majority of such products for sale, based on either gross sales dollars or volume, have been produced by the owner of the land on which the facility is located, except that all such activities may be limited to parcels of more than five acres in area not zoned for agriculture, horticulture, floriculture, or viticulture. For such purposes, land divided by a public or private way or a waterway shall be construed as one parcel. No zoning ordinance or by-law shall exempt land or structures from flood plain or wetlands regulations established pursuant to general law.

No zoning ordinance or by-law shall regulate or restrict the interior area of a single family residential building nor shall any such ordinance or by-law prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. Lands or structures used, or to be used by a public service corporation may be exempted in particular respects from the operation of a zoning ordinance or by-law if, upon petition of the corporation, the department of public utilities shall, after notice given pursuant to section eleven and public hearing in the town or city, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public; provided however, that if lands or structures used or to be used by a public service corporation are located in more than one municipality such lands or structures may be exempted in particular respects from the operation of any zoning ordinance or by-law if, upon petition of the corporation, the department of public utilities shall after notice to all affected communities and public hearing in one of said municipalities, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public.

Notwithstanding any general or special law to the contrary, local land use and health and safety laws, regulations, practices, ordinances, by-laws and decisions of a city or town shall not discriminate against a disabled person. Imposition of health and safety laws or land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size or other unrelated persons shall constitute discrimination. The provisions of this paragraph shall apply to every city or town, including, but not limited to the city of Boston and the city of Cambridge.

Family day care home, as defined in section nine of chapter twenty-eight A, shall be an allowable use unless a city or town prohibits or specifically regulates such use in its zoning ordinances or by-laws.

No provision of a zoning ordinance or by-law shall be valid which sets apart districts by any boundary line which may be changed without adoption of an amendment to the zoning ordinance or by-law.

No zoning ordinance or by-law shall prohibit the owner and occupier of a residence which has been destroyed by fire or other natural holocaust from placing a mobile home on the site of such residence and residing in such home for a period not to exceed twelve months while the residence is being rebuilt. Any such mobile home shall be subject to the provisions of the state sanitary code.

No dimensional lot requirement of a zoning ordinance or by-law, including but not limited to, set back, front yard, side yard, rear yard and open space shall apply to handicapped access ramps on private property used solely for the purpose of facilitating ingress or egress of a physically handicapped person, as defined in section thirteen A of chapter twenty-two.

No zoning ordinance or by-law shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety or welfare. (1975, 808, § 3; 1977, 860; 1982, 40, approved April 23, 1982, effective 90 days thereafter; 1983, 91, approved May 10, 1983, effective 90 days thereafter; 1985, 637 § 2, approved December 23, 1985, effective 90 days thereafter; 1987, 191, approved June 30, 1987, effective 90 days thereafter; 1989, 106, § 1, approved June 5, 1989, effective 90 days thereafter; 1989, 341, § 117, approved, with emergency preamble, August 15, 1989; 1989, 590, approved Dec 8, 1989, effective 90 days thereafter.)

Editorial Note—

The 1983 amendment added the paragraph exempting from dimensional lot requirements ramps on private property used solely for the purpose of facilitating ingress or egress of a physically handicapped person.

The 1985 amendment added a paragraph concerning solar energy systems.

The 1987 amendment added the third paragraph, relating to family day care homes as an allowable use.

The first 1989 amendment added a new third paragraph prohibiting housing discrimination against disabled persons.

The second 1989 amendment added to the third paragraph, as inserted by 1989, 106, § 1, a sentence relative to the applicability of such paragraph to every city or town, including, but not limited to, the cities of Boston and Cambridge.

Supplement to Chapters 40-40A
C. 40A
Notwithstanding any general or special law to the contrary, local land use and health and safety laws, regulations, practices, ordinances, by-laws and decisions of a city or town shall not discriminate against a disabled person. Imposition of health and safety laws or land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size or other unrelated persons shall constitute discrimination. The provisions of this paragraph shall apply to every city or town, including, but not limited to the city of Boston and the city of Cambridge.

§ 3. Limitations on Subject Matter.

No zoning ordinance or by-law shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code, nor shall any such ordinance or by-law prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture, horticulture, floriculture, or viticulture; nor prohibit, or unreasonably regulate, or require a special permit for the use, expansion, or reconstruction of existing structures thereon for the primary purpose of agriculture, horticulture, floriculture, or viticulture, including those facilities for the sale of produce, and wine and dairy products, provided that during the months of June, July, August, and September of every year, the majority of such products for sale, based on either gross sales dollars or volume, have been produced by the owner of the land on which the facility is located, except that all such activities may be limited to parcels of more than five acres in area not zoned for agriculture, horticulture, floriculture, or viticulture. For such purposes, land divided by a public or private way or a waterway shall be construed as one parcel. No zoning ordinance or by-law shall exempt land or structures from flood plain or wetlands regulations established pursuant to general law.

No zoning ordinance or by-law shall regulate or restrict the interior area of a single family residential building nor shall any such ordinance or by-law prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. Lands or structures used, or to be used by a public service corporation may be exempted in particular respects from the operation of a zoning ordinance or by-law if, upon petition of the corporation, the department of public utilities shall, after notice given pursuant to section eleven and public hearing in the town or city, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public; provided however, that if lands or structures used or to be used by a public service corporation are located in more than one municipality such lands or structures may be exempted in particular respects from the operation of any zoning ordinance or by-law if, upon petition of the corporation, the department of public utilities shall after notice to all affected communities and public hearing in one of said municipalities, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public.

Notwithstanding any general or special law to the contrary, local land use and health and safety laws, regulations, practices, ordinances, by-laws and decisions of a city or town shall not discriminate against a disabled person. Imposition of health and safety laws or land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size or other unrelated persons shall constitute discrimination. The provisions of this paragraph shall apply to every city or town, including, but not limited to the city of Boston and the city of Cambridge.

Family day care home, as defined in section nine of chapter twenty-eight A, shall be an allowable use unless a city or town prohibits or specifically regulates such use in its zoning ordinances or by-laws.

No provision of a zoning ordinance or by-law shall be valid which sets apart districts by any boundary line which may be changed without adoption of an amendment to the zoning ordinance or by-law.

No zoning ordinance or by-law shall prohibit the owner and occupier of a residence which has been destroyed by fire or other natural holocaust from placing a mobile home on the site of such residence and residing in such home for a period not to exceed twelve months while the residence is being rebuilt. Any such mobile home shall be subject to the provisions of the state sanitary code.

No dimensional lot requirement of a zoning ordinance or by-law, including but not limited to, set back, front yard, side yard, rear yard and open space shall apply to handicapped access ramps on private property used solely for the purpose of facilitating ingress or egress of a physically handicapped person, as defined in section thirteen A of chapter twenty-two.

No zoning ordinance or by-law shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety or welfare. (1975, 808, § 3; 1977, 860; 1982, 40, approved April 23, 1982, effective 90 days thereafter; 1983, 91, approved May 10, 1983, effective 90 days thereafter; 1985, 637 § 2, approved December 23, 1985, effective 90 days thereafter; 1987, 191, approved June 30, 1987, effective 90 days thereafter; 1989, 106, § 1, approved June 5, 1989, effective 90 days thereafter; 1989, 341, § 117, approved, with emergency preamble, August 15, 1989; 1989, 590, approved Dec 8, 1989, effective 90 days thereafter.)

Editorial Note.—

The 1983 amendment added the paragraph exempting from dimensional lot requirements ramps on private property used solely for the purpose of facilitating ingress or egress of a physically handicapped person.

The 1985 amendment added a paragraph concerning solar energy systems.

The 1987 amendment added the third paragraph, relating to family day care homes as an allowable use.

The first 1989 amendment added a new third paragraph prohibiting housing discrimination against disabled persons.

The second 1989 amendment added to the third paragraph, as inserted by 1989, 106, § 1, a sentence relative to the applicability of such paragraph to every city or town, including, but not limited to, the cities of Boston and Cambridge.



The Commonwealth of Massachusetts

Department of Mental Health

Metro Boston Region

591 Morton Street

Dorchester, Massachusetts 02121

Henry Tomas, Ph.D.
Commissioner

Gerald J. Morrissey, Jr.
Director

Area Code (617)
265-3919
265-3924
727-4923

November 16, 1990

Dear Neighborhood Council/PZAC Members:

As you know, the Massachusetts Legislature recently enacted legislation to prohibit any housing discrimination against the mentally ill (Chapter 151B rev. Section 4, sub-section 6, 7, 8 enacted January 2, 1990). The intent of this legislation was to bring all communities in the Commonwealth into conformity with the new Federal Statute (42 U.S. Code, Section 3601: The Fair Housing Act).

The Department of Mental Health has collaborated with the City of Boston on the successful siting of group homes for this protected class of people throughout the city. Over the past several months, we have worked to develop a proposed revision of the Zoning Code which we would like to bring before the BRA for immediate action to ensure compliance with State and Federal laws.

We hope that you will support these efforts which have profound implications for persons with mental illness and their ability to thrive in our communities. Further it creates an opportunity to provide a solution for those persons who are homeless and mentally ill, which is permanent housing. The Mayor's Office of Neighborhood Services has been insistent that we communicate our intentions to file these zoning code changes with neighborhood leaders across the city. Prior to bringing this proposal to the BRA we would like to have an informational meeting with community leaders to enlist their support for this revision of the zoning code, that will bring the City of Boston into conformity with State and Federal law. This meeting will be held on Tuesday, November 27, 1990, 6:30 p.m., in the Revere Room of Erich Lindemann Mental Health Center, 25 Staniford Street, Boston.

Please contact me if there are any questions. Thank you for your assistance.

Sincerely,

Gerry Morrissey
Gerry Morrissey
Interim Area Director
Metro Boston Area



Mayor's Office of Neighborhood Services City of Boston

RAYMOND L. FLYNN
MAYOR

Boston City Hall — Room 708
Boston, Massachusetts 02201
617-725-3485

JOHN RIORDAN
DIRECTOR

December 13, 1990

Dear Community Leader:

The state Department of Mental Health recently sent you and your neighbors a letter explaining a proposed zoning change designed to bring the City of Boston Zoning Code into compliance with new state and federal legislation regarding housing for the mentally ill and mentally retarded, and physically handicapped.

At our urging, the letter also announced a November 27 informational meeting on this issue. Some community representatives took that opportunity to learn more about the proposed zoning change. I am writing at this time to provide additional information regarding this proposed zoning and to inform you about an upcoming public hearing on this zoning change.

Specifically, the Boston Redevelopment Authority has petitioned the Boston Zoning Commission to amend the Boston Zoning Code. The BRA has scheduled a public hearing on **Thursday, December 20 in the BRA Board Room, City Hall, Room 901 at 2:30 p.m.** to provide information and solicit public input on this legislation. I would like to invite you to participate in the public hearing. Your Neighborhood Coordinator is also available to answer any questions you may have or to put you in touch with someone from the state Department of Mental Health.

The proposed legislation would eliminate the conditional use permit restriction currently placed on housing for the chronically mentally ill, mentally retarded and physically handicapped. It does not free developers from zoning regulations that apply to the surrounding community. Standard zoning restrictions on height, parking and dimensional requirements will still apply. The legislation simply requires that zoning decisions be made without regard to the fact that the housing will be available to mentally ill, mentally retarded or physically handicapped individuals.

The proposed legislation applies only to mentally ill, mentally retarded and physically handicapped individuals. It would have no impact on current zoning restrictions that apply to group residences

for drug and alcohol rehabilitation, and housing for pre-release or post-release convicts or juveniles. Those types of group residences will continue to require a conditional use permit.

As we have in the past, we will continue to work with the residents of Boston's neighborhoods to ensure that the community has input into any proposed development and engages in dialogue with developers. This process has resulted in neighborhoods all across the city opening their arms to mentally ill and mentally retarded individuals.

If you need any additional information, please feel free to call the Mayor's Office of Neighborhood Services at 725-3485.

Sincerely,

John Riordan
Director
Neighborhood Services

104 CMR 18.00: ENFORCEMENT

Section

- 18.01: Introduction
- 18.02: Licensing
- 18.03: Contracting
- 18.04: Enforcement Powers Common to Licensing and Contracting

18.01: Introduction

104 CMR 18.00 describes two types of relationships which may exist between the Department and a program and specifies the enforcement powers which result from the relationship.

18.02: Licensing(1) Generally

(a) In accordance with M.G.L. c. 19 s. 29, the Department shall issue and renew licenses to operators of programs specified in 104 CMR 17.00 which provide care, treatment, training, support and/or supervision to mentally ill persons. The Department shall issue a license to a Program applicant only after an affirmative demonstration that the licensure standards of this chapter and the applicable requirements of 104 CMR 17.00 are met.

(b) The program applicant shall be the agency or person with principal legal responsibility for the administration and conduct of the program. If an agency or individual runs more than one program, such agency or individual shall apply for a separate license as appropriate for each program.

(c) Operation of Unlicensed Programs. When the Department has reason to believe that a program which is subject to licensure by the Department is operating without a valid and current license, and the program has failed to apply for a license within ten (10) days after notice by the Department, the Department may

1. Notify the District Attorney with jurisdiction over the program that the program appears to be operating in violation of M.G.L. c. 19, s. 29, making the operator liable for fine or imprisonment;

2. Petition the Superior Court with jurisdiction over the program to restrain its operation or to take such other actions as may be necessary in the interest of the clients utilizing the program;

3. Undertake to provide alternative placements with the most adequate and appropriate alternative service arrangement available for clients from the program.

(2) Programs Subject to Licensure Requirements. Programs shall be subject to licensure in accordance with 104 CMR 17.00.

(3) Duration of License. Licenses issued under 104 CMR 18.02 shall be valid for a term of two (2) years and may be renewed for like terms, subject to revocation for cause. Licenses are not transferable from one licensee to another individual or agency or from one location to another.

(4) Provisional License. A provisional license shall be used for programs not currently in operation and for which compliance cannot fully be determined without an evaluation of the program in operation. Within six (6) months after the granting of a provisional license or the initial provision of services by the program, the Department shall conduct an evaluation of the program to determine what action regarding licensure should be taken.

(5) Application Process for License or Renewal

(a) Any Program Applicant who seeks to establish or maintain a program specified in 104 CMR 17.00 shall file an application in writing with the Department in a manner and on a form prescribed by the Department. Any Program Applicant seeking to renew a license shall file an application for such renewal in writing with the Department, in a manner and on a form prescribed by the Department, not less than ninety (90) days prior to the date of expiration of its current license. It shall be the responsibility of the

18.02: continued

Department to act upon an application within the ninety (90)-day period. Failure to do so shall not invalidate a previously existing license.

(b) A Program Applicant shall satisfy the Department that it meets all applicable requirements of 104 CMR 17.00.

(c) A Program Applicant shall maintain the following documentation which shall be made available to the Department upon request:

1. For business corporations, a copy of an Administration and Finance (A&F) Form 4-A which can be obtained from a Department Regional Office, together with any special or periodic reports submitted in amendment or supplementation to the annual report. In addition, for corporations incorporated within the previous year, a copy of the Articles of Incorporation and by-laws.

2. For non-profit corporations, a certified copy of the last annual report filed with the Secretary of State pursuant to M.G.L. c. 180, s. 26A, together with any special or periodic report submitted in amendment or supplementation to the annual report, and a certified copy of the last annual report, any filed with the Office of the Attorney General pursuant to M.G.L. c. 12, s. 8F; or for non-profit corporations incorporated within the previous year, a copy of the Articles of Incorporation and by-laws.

3. A list of the names of all persons with any financial interest in the program including but not limited to, persons with ownership interests in the building or buildings used by the program, paid or unpaid directors, shareholders, partners, loan creditor mortgagees, salaried employees and consultants. The financial interest statement shall be updated as necessary to accommodate changes.

4. On forms provided by the Department a subject to audit or inspection by the Department, financial and other to determine the qualifications of the Program Applicant and its program for licensure.

(d) The Department may visit the site of all programs for which license application has been made and shall determine the compliance of the program with the requirements of this chapter and any other applicable Department regulations.

(e) Prior to the award of an initial or renewal license after completion of the Department's initial licensing review phase, the Area Board may, within 30 days of receipt of the license application, review and comment on the qualifications of the Program Applicant and any other matter relevant to the capacity of the Program Applicant to provide services in accordance with this chapter and other applicable Department regulations.

(6) Compliance Requirements. A program shall be deemed to be in compliance with this chapter if:

(a) The program meets or will meet upon initial operation of the program, all applicable requirements under both this and any other applicable chapters of Title 104.

(b) With respect to requirements which are not met and which will not be met by the time of initial operation, the Program Applicant has either:

1. Obtained approval by the Department for the waiver of requirement(s) under 104 CMR 18.02(7); or

2. Obtained approval by the Department for the operation of the program under a deficiency correction order and plan under 104 CMR 18.02(8); or

3. Obtained a provisional license subject to evaluation within six months in accordance with 104 CMR 18.02(4).

(7) Waiver of Requirements

(a) The requirements of this chapter and all other applicable chapters shall be strictly enforced, and shall not be subject to waiver, except as specifically authorized by the Department in accordance with the provisions of this subsection, 104 CMR 18.02 (7).

(b) No waiver shall be granted by the Department without a petition by the applicant and a determination by the Department that:

1. The health, safety or welfare of either clients or staff of the program shall not be adversely affected by granting the waiver.

104 CMR: DEPARTMENT OF MENTAL HEALTH

18.02: continued

2. In petitioning for the waiver, the Program Applicant has stated a substitute provision or alternative standard which is deemed by the Department to result in a comparable quantity and quality of a services to the clients and to which the Program Applicant agrees to be held accountable to the same degree and manner as any applicable provision of 104 CMR 15.00 - 18.00.

(c) Waivers shall be granted for the duration of a license period only and may be renewable.

(d) The granting of a waiver for any single program or license period, shall not guarantee the granting of a waiver for any other program or license period.

(e) Departmental Action on License Application. Upon receipt and review of all required documentation to the satisfaction of the Department, and after any site visit and review pursuant to 104 CMR 18.02(5) and in accordance with the evaluation period, if any, authorized by 104 CMR 18.02(4), the Department may take one of the following actions:

(a) Approve the program for licensure, if no deficiency correction orders are outstanding

(b) Disapprove the program for licensure until such time as deficiencies are corrected.

(c) Approve the program for licensure, subject to demonstrated progress by the Program Applicant in implementing a plan of correction approved by the Department.

(d) Approve the program for a provisional license.

18.03: Contracting

(1) Generally.

(a) The applicant for a contract shall be the agency or person with principal legal responsibility for the administration and conduct of the program.

(b) The provisions of these regulations are in addition to the specific requirements of an individual contract.

(2) Duration of Contract. The duration of the contract shall be as specified by the specific terms of the individual contract.

(3) Application Process for Contract.

(a) Any person, corporation, organization, government agency or other legal entity desiring funding from the Department shall file an application with the Department for the operation of a program or part of a program as defined in 104 CMR 15.02(34). Such application shall be in writing and shall be in a manner and on a form prescribed by the Department.

(b) If the location of the program is known at the time of application for funding, the applicant for funding shall satisfy the Department that:

1. The program is in compliance with the use and occupancy requirements of the State Building Code, 780 CMR 2.00, applicable to the particular program.

2. The program is in compliance with the State Sanitary Code and any applicable local health and safety codes.

3. If any certificate or approval relating to the State Building Code, 780 CMR 2.00, State Sanitary Code, local health and safety codes or zoning code is granted with any waiver, variance or other modification, the funding applicant shall report this fact in writing to the Department within seven days. The Department may refuse to recognize any waiver, variance or other modification so granted, in the discretion of the Department, such waiver, variance or other modification is inconsistent with the welfare of the clients served by the program.

(c) An applicant for funding shall maintain the following documentation which shall be made available to the Department upon request:

1. For business corporations, a copy of an Administration and Finance (A&F) Form 4-A which can be obtained from a Department Regional Office, together with any special or periodic reports submitted in amendment or supplementation to the annual report. In addition, for

104 CMR: DEPARTMENT OF MENTAL HEALTH

18.03: continued

corporations incorporated within the previous year, a copy of the Articles of Incorporation and by-laws.

2. For non-profit corporations, a certified copy of the last annual report, filed with the Secretary of State pursuant to M.G.L. c.180, s.26A, together with any special or periodic reports submitted in amendment or supplementation to the annual report, and a certified copy of the last annual report filed with the Office of the Attorney General pursuant to M.G.L. c. 12, s. 8F; or for non-profit corporations incorporated within the previous year, a copy of the Articles of Incorporation and by-laws.

3. A list of the names of all persons with any financial interest in the program including but not limited to persons with ownership interests in the building or buildings used by the program, paid or unpaid directors, shareholders, partners, loan creditors, mortgagees, salaried employees and consultants. The financial interest statement shall be updated as necessary to accommodate changes.

4. On forms provided by the Department and subject to audit or inspection by the Department, financial and other information necessary for the Department to determine the qualifications of the applicant for funding and its program.

5. The applicant for funding shall describe whether the city or town has granted or denied a certificate of occupancy and keep copies of all correspondence, certificates or other documentation relating to its certificate of occupancy, including a statement by the applicant for funding as to whether the city or town has granted or denied a certificate of occupancy.

(4) Compliance Requirements. A program shall be deemed in compliance with this chapter if:

(a) The program meets or will meet, upon initial operation of the program, all applicable requirements under both this and any other chapters of Title 104; or

(b) With respect to requirements which are not met and which will not be met by the time of initial operation, the applicant has obtained approval by the Department for the waiver of requirement(s) under 104 CMR 18.03 (5).

(5) Waiver of Requirements. The requirements of 104 CMR 18.03 and all applicable chapters shall be strictly enforced, and shall not be subject to waiver, except as specifically authorized by the Department in accordance with the provisions of this subsection.

(a) No waiver shall be granted by the Department without a petition by the Funding Applicant and a determination by the Department that:

1. The health, safety or welfare of either clients or staff of the Funding Applicant shall not be adversely affected by granting the waiver.

2. In petitioning for the waiver, the Funding Applicant has stated a substitute provision or alternative standard which is deemed by the Department to result in a comparable quantity and quality of services to the clients and to which the Funding Applicant agrees to be held accountable to the same degree and manner as any applicable provision of 104 CMR 15.00 - 18.00.

(b) Waivers shall be granted for the duration of a contract period only, and may be renewable should another contract be awarded.

(c) The granting of a waiver for any single contractor or contract period shall not mean the granting of a waiver for any other contractor or contract period.

(6) Department Action on Application. Upon receipt and review of an application for funding and all required documentation to the satisfaction of the Department, and after any site visit and review in accordance with 104 CMR 18.05(2) and any other procedures prescribed by the Department, the Department may take any of the following actions:

(a) enter into a contract with the Funding Applicant;

(b) reject the application; or

(c) negotiate with the Funding Applicant to determine whether to enter into a contract.

18.04: Enforcement Powers Common to Licensing and Contracting

(1) Generally. This subsection applies to all programs subject to licensure by the Department and under contract with the Department.

(2) Visits by the Department. Any employee of the Department, including a consultant providing services for the Department, authorized by the Commissioner, may visit and inspect any program subject to this section in order to determine whether such program is being operated in compliance with law, with the regulations of the Department, and if under contract, with the provisions of that contract.

(3) Departmental Inspection. The Department may inspect each program at least annually and more frequently if deemed necessary to ensure compliance with these regulations.

(a) Inspections should ordinarily be made with prior notice and at reasonable times, giving due regard to the privacy of the clients and the interruption that inspection may cause. However, the Department shall have the right to inspect any program at any time without prior notice providing good cause exists.

1. In the case of programs under contract with the Department, such inspection shall be in accordance with the terms of the contract.

(b) Generally, inspections will be conducted under the supervision of the Regional Services Administrator, who may designate such persons as he or she deems necessary to accomplish the purposes of the inspection. Annual inspections may also include a minimum of one consumer member of the Area Board and other private persons who may have requested in advance to participate; provided however, that:

1. The Department may exercise reasonable discretion in limiting the number of participants in any inspection;

2. Confidential information concerning clients shall not be disclosed except in accordance with the confidentiality requirements of 104 CMR 15.03(9) or the service contract, where applicable.

(c) Refusal to permit an inspection in accordance with this section shall be grounds for suspension, termination, or revocation of a license or contract.

(d) The personal belongings, clothing and storage spaces of clients, such as but not limited to closets, dressers and trunks, shall not be subject to inspection by the Department without the consent of the client.

(e) The scope of the Department's inspection may include but shall not be limited to:

1. Examination and review of matters covered in the program's application for licensure or contract;

2. Investigation of practices relating to the client's legal and human rights within the program;

3. Visit to all parts of the premises and review of the general condition of the buildings, furnishing and grounds;

4. Examination and review of all treatment plans, and where applicable, ISPs, and assessments;

5. Review of compliance with recommendations and deficiency correction orders made in previous inspections;

6. Examination of emergency medical supplies and equipment, as well as logs and records concerning their maintenance;

7. An evaluation of the quality of the psychological and physical environment of the program;

8. Review of construction and improvements contemplated or made since the last inspection;

9. Inspection of the adequacy and sanitary conditions of bathrooms, toilets, mattresses and clothes, as appropriate;

10. Examination of the menus, including the nutritional balance and the service, preparation, storage and palatability of the food, as appropriate.

(f) The Department shall provide a copy of the inspection report to the program director, and modified to exclude the communication of confidential personal information concerning clients, to any interested person upon request.

18.04: continued

(4) Deficiency Identification and Correction.

(a) Whenever the Department finds upon inspection or through information that a program is not in compliance with any applicable law or regulation, other than in accordance with a waiver approved by the Department, the Department shall order the correction of the deficiency or the suspension or termination of the license or contract.

1. Failure of any employee of the Department to transmit promptly to the Area Director or the Regional Services Administrator information regarding apparent or alleged non-compliance shall be grounds for disciplinary action.

(b) Every such correction order shall be in writing and shall include a statement of the deficiencies found, the period within which the deficiency must be corrected, and the provision of law and regulation relied upon.

(c) Within seven days of receipt of the correction order the program may file a written request with the Department for administrative reconsideration of the findings or any portion thereof, which shall be granted forthwith.

(d) In the event that the program director fails to correct any deficiency within the period prescribed for correction, the Department shall enforce its correction order under 104 CMR 18.04 or in accordance with M.G.L. c.19.

(5) Suspension, Revocation and Refusal to Issue or Renew Licenses or Contracts. After a hearing conducted pursuant to M.G.L. c.30A, if such hearing is required by M.G.L. c.30A, and, where applicable, in accordance with contract provisions, the Department may revoke, suspend, limit, refuse to issue or refuse to renew a license or contract if it finds any of the following:

(a) The program failed to comply with any applicable regulation or any deficiency correction order;

(b) The program refused to admit at any time any person authorized by the Commissioner to inspect the program in accordance with 104 CMR 18.04(3);

(c) The program refused to submit any report or to make available any records required under these regulations;

(d) The program made any misleading or false statements or failed to furnish any information or report required under these regulations.

(6) Suspension in Emergencies.

(a) The Department may refuse to issue, may renew or may suspend any license or contract without a hearing if the failure of the program to comply with any applicable regulations appears to have resulted in an emergency situation which endangers the life, health or safety of clients or staff.

(b) Immediately upon such refusal or suspension, the Department shall notify the clients and their families, when appropriate, and legal guardians, if any, and shall immediately provide or arrange for the most adequate and appropriate alternative service arrangements available for such clients, or take such other action, including but not limited to placing Department employees within the program, as the Department deems adequate to protect the clients.

(c) The Department shall hold a conference with the program and, if it has not done so before, provide a written statement as to its reasons for suspension, within three (3) days of suspension.

(d) Upon written request of an aggrieved party to the Commissioner, a hearing shall be held within a reasonable amount of time after the license or contract is refused or suspended, in accordance with the requirements of M.G.L. c.30A.

1. In the case of contract suspension, the hearing shall be held as specified in the contract.

(7) Notification of Legal Proceedings. Every program shall report in writing to the Commissioner any legal proceeding, within ten days of initiation of such proceedings, brought against the program or any person employed by the program, if such proceeding arises out of circumstances related to the care, treatment, training, supervision or, if applicable, living environment, of clients utilizing the program.

18.04: continued

(8) Change of Name, Ownership, Location or Services.

(a) Licenses or contracts shall not be transferable from one licensee or contractor to another, or from one location to another.

(b) The program shall provide prior notification in writing to the Department of any change in ownership or of any change in the financial interests of persons associated with the program.

(c) The program shall notify the Department in writing of any change in the directorship of the program.

(d) The program shall notify the Department in writing of any changes in the physical plant of the program, in the quality of services provided, or of any other changes in the program which place the program out of compliance with any provision of this Title within ten (10) days of such change.

(e) The failure of a program to notify the Department of any change of name, ownership, location or services shall be grounds for suspension or termination of the program's license or contract.

REGULATORY AUTHORITY

104 CMR 18.00: M.G.L. c. 19, s. 1, 17, 26, 29;
M.G.L. c. 123, s. 2.

